No. 3000

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

CHARLES E. KING, Appellant,

vs.

WILLIAM O. SMITH, E. FAXON BISHOP, ALBERT F. JUDD and ALFRED W. CARTER, as Trustees Under the Will and of the Estate of BERNICE P. BISHOP, Deceased, Appellees.

Brief of Appellant

Upon Appeal from the Supreme Court of the Territory of Hawaii.

E. C. PETERS,
Attorney for Appellant

Filed this ..... day of ....., 1917.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

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SUBJECT INDEX.

Brief of Appellant

STATEMENT OF FACTS

Bernice Pauahi Bishop died testate in Honolulu on October 16, 1884, leaving a last will and testament, including two codicils, which was admitted to probate December 2, 1884, in the Supreme Court of the Territory of Hawaii, which court at that time had jurisdiction of probate and equity matters.

In the said will the said Bernice Pauahi Bishop, after making a number of devises and bequests, devised the residue of her estate to five trustees therein appointed, and directed that they use the said residue in the erection and maintenance in the Hawaiian Islands of certain schools to be called the Kamehameha Schools.

The trustees are given considerable discretion and power in the matter of selling, investing and reinvesting, and so on, the estate, it being provided that a portion of the income for each year be devoted to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure and part aboriginal blood.

In and by the fourteenth paragraph of her will Mrs. Bishop appointed her husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith, all of Honolulu, "to be her trustees to carry into effect the trust" specified in

the will, the said paragraph containing this further provision:

> "I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of the majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."

Vacancies have occurred from time to time in the personnel of the board of trustees. On June 9, 1916, the written resignation of Samuel M. Damon as a trustee was presented to the First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, who at chambers exercises original jurisdiction in equity and who has original jurisdiction of the trust created by said will. The resignation was accepted, and on the same day a request was presented to the Justices of the Supreme Court of the Territory of Hawaii, calling to their attention the resignation of the said Samuel M. Damon as trustee and asking for the appointment of a new trustee in his place.

William Williamson was appointed by the said Justices to fill the vacancy. Thereupon and thereafter on the same day, the trustees presented to the First Judge of the First Circuit Court aforementioned, a petition setting forth the facts of the vacancy, the appointment of William Williamson by the Justices of the Supreme Court, that William Williamson "is a person of the Protestant religion," and prayed that

his appointment as such trustee be confirmed by the said First Circuit Judge. A hearing of the said petition was immediately had when certain evidence touching the qualifications and fitness of the said William Williamson as such trustee was introduced. Thereafter and on the 29th day of July, 1916, the said Circuit Judge in an "Opinion and Decision" decided that the appointment of the said William Williamson as aforesaid was without authority, null and void, and he further made an order appointing Charles E. King as trustee to fill the vacancy created by the resignation of Samuel M. Damon as aforesaid and fixed his bond in the sum of $20,000.00.

On August 3, 1916, a decree was signed and filed by the said Circuit Judge in conformity with his said opinion. From this the remaining trustees appealed to the Supreme Court of the Territory of Hawaii, which said Supreme Court on the 1st day of February, 1917, rendered its opinion followed by a decision filed on the 13th day of February, 1917, in which it reversed the decree of the said Circuit Judge appealed from.

From this opinion and the decision entered thereon the present appeal has been taken to the United States Circuit Court of Appeals for the Ninth Circuit, and the question now is as to the correctness of the ruling of the Supreme Court of the Territory of Hawaii.

Previous to the hearing of the appeal in the Supreme Court of the Territory of Hawaii, a suggestion of the disqualification of the Chief Justice and of

Associate Justice Quarles, because of pecuniary interest, was filed, the Court deciding that neither of the members named was pecuniarily interested in the cause.

BRIEF OF ARGUMENT ON DISQUALIFICATION.

Section 84 of the Organic Act of the Territory of Hawaii provides: "That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to these herein enumerated."

1 A. By Section 84 of the Organic Act of the Territory of Hawaii, "pecuniary interest", direct or indirect, is a judicial disqualification.

The disqualifying interest may be indirect as well as direct. And the judge may be disqualified even though not a party to the proceeding.

1 B. The justices of the Supreme Court of the Territory of Hawaii claim to be donees of a power of appointing trustees under the provisions of the trust created by the will of Bernice Pauahi Bishop, the legal-

ity of the exercise of which is the direct subject of controversy in this case.

The action of the several justices of this court in appointing William Williamson, Trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in place of and in succession to Samuel M. Damon, resigned, was in the pretended exercise of the power of appointing new trustees under the fourteenth clause of the will of said decedent. And the only point involved in this proceeding is the legality of the appointment of Mr. Williamson.

This claim of power is a "personal" as well as a "property" interest. And is a disqualifying interest under the provisions of the Organic Act.

1 C. "Pecuniary interest" means "personal interest" or "property interest" and an "interest affecting individual rights."

The words "interest" and "pecuniary interest" are used interchangeably in the statutes of the several states fixing disqualifications of judges. Section 84 of the Organic Act would be just as potent if it simply made "interest" of the judge a disqualification. An examination of the authorities indicates that "pecuniary interest" or "interest" involves "individual rights" as well as "pecuniary" or "property" interest.

In *Clyma* vs. *Kennedy,* 64 Conn. 310, 42 A. S. R. 195, Statute of Conn., disqualified for "interest", the court said: "He had no pecuniary interest in the subject matter of the action. It was not his own cause."

In Mississippi, a judge is disqualified when "interested in the cause". In *Ferguson* vs. *Brown*, 21 Southerner 603-607, the court held: "The interest which disqualified a judge under the constitution is not the kind of interest which one feels in public proceedings or public measures. It must be pecuniary or property interest or one affecting his individual rights; and the liability or pecuniary gain or relief to the judge must occur upon the event of the statute, not result remotely in the future from the general operation of laws and government upon the statutes fixed by the decision."

In Texas the statute provides that "no judge of the county court shall sit in any case wherein he may be interested." In *Wallis* vs. *McInness*, 44 S. W. (Texas) 537, Wallis as county judge brought suit against McInness for the use and benefit of the county, upon a certain supersedeas bond executed and payable to Wallis as such officer. The court held: "The interest which disqualifies a judge from sitting in case does not signify every bias, partial prejudice which he may entertain with reference to the case and which may be included in the broadest sense of the word 'interest' as commonly distinguished from its use as indicating a pecuniary personal privilege in the same way dependent upon the result of the case."

Also in *Casey* vs. *Kinsey*, 23 S. W. (Texas) 818, the court said, citing the Castlebury case: "To constitute such interest as herein disqualifies the judge within the meaning of this section from presiding it is not necessary that he should be a party. It is suffi-

cient if he is in any wise interested in the subject matter."

In Nebraska the statute provides: "The judge * * * is disqualified from acting as such * * * in any case wherein he is interested * * *." In *Chicago B. and G. R. Co.* vs. *Kellogg*, 74 N. W. (Nebr.) 403-404, the court held: "The word interested found in this section of the statute probably means 'pecuniarily interested' or at least it means that a judge to be disqualified from hearing a case must be in such a situation with reference to it or to the parties that he will gain or lose something by the result of the action on trial."

The statute of Minnesota provides: "No Judge * * * shall sit in any cause in which he is interested * * * or would be excluded from sitting as a juror." The statute in relation to jurors provides that the grounds for challenge are "consanguinity or affinity within the 9th degree, or any one of the attorneys either for the prosecution or the defense." In *Sjorberg* vs. *Nordin*, 5 N. W. (Minn.) 677, the court held: "A pecuniary interest in the event of the action is the cause of disqualification intended to be reached by the section and not a mere bias resulting from partiality or prejudice in favor or against either of the parties."

The Alabama statute places "interest" as a disqualification. In *Ex parte Alabama State Bar Assn.* 8 So. (Ala.) 768-770, the court held: "The interest

which will disqualify must be a pecuniary one or one affecting the individual rights of the judge. Moreover, liability or pecuniary gain or relief to the judge must occur in the event of the case, not result remotely in the future from the general operation of law upon the statutes fixed by the decision."

The statute of Florida provides: "No judge of any court or justice of the peace shall sit or preside in any cause to which he is a party or in which he is interested or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties * * *. In *Ex parte Harris*, 6 L. R. A. (Fla.) 713, the court held: "The interest that disqualifies a judge under the statute is a property interest in the action or its result in contradistinction of an interest of feeling or sympathy or both that would disqualify a juror."

In Vermont, one of the disqualifications is "interest". In *State* vs. *Sutton*, 52 Atl. (Vt.) 116, the court held this to mean "pecuniary interest".

In *Phillips* vs. *Curley*, 62 Pac. (Colo.), a judge who was a candidate for reelection on the Bryan Democratic ticket was held disqualified for reason of "interest" in an appeal from the County Clerk rejecting a protest against placing the nominations of said party on the official ballot.

1 D. If "pecuniary interest" in the sense of interest involving money or value, alone controls, the judge might sit upon and decide the legality of his own acts

as a donee of powers, of which the following are a few illustrations:

1. Donee of power of attorney, not coupled with an interest.

2. Collateral donee of power of appointment to a use, or legal estate.

3. Donee of power to appoint co-executor.

4. Surviving trustee as donee of a power of appointing new co-trustee.

The illustrations merely involve "individual rights". No pecuniary gain or loss is involved. And yet the judge would practically be sitting as a judge of his own cause if he were to attempt to decide the legality of an act performed by him as an attorney in fact. The collateral donee of a power of appointment has no estate in the property subject to the power and yet the donee of that power could not sit as a judge upon the question of the legality of its exercise. Should an executor have testamentary power of appointing a co-executor, it would merely be a question of individual rights. Likewise as to the power of a surviving trustee or trustees to appoint a new co-trustee.

1 E. The statute pertaining to judicial disqualification should be liberally construed.

In the case of *Mining Co.* vs. *Keyser*, 58 Cal. 315-322, the court held: "This provision should not receive a technical or strict construction, but rather one that is broad and liberal" and quoting from the Supreme Court of Michigan: "The court ought not to be

astute to discover refined and subtle distinctions to save a case from the operation of the maxim when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance."

In *Oakley* vs. *Aspinwall,* 3 N. Y. 547, 552, the court holds: "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases, and it is important in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state—the community—is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

BRIEF OF ARGUMENT ON MERITS.

1. *Assuming the words "choice" and "selection" are synonymous with "appoint" the fourteenth clause of the will of the testator reposed the power of appointment in the Supreme Court as a court, and not in a majority, for the time being, of the members thereof.*

A. *The Supreme Court in banco at the time of the execution of the will had authority to appoint trustees.*

1 A 1. The Supreme Court was vested with general equity jurisdiction.

By the constitution of 1852 (Art. 84) the "judicial power" of the Kingdom was defined as including all cases in equity arising under any law of the Kingdom. By Article 81 of the same constitution, the "judicial power" of the Kingdom was vested in the Supreme Court and in such inferior courts as the Legislature might from time to time establish. And by Article 85, its administration was to be "divided" among the Supreme Court and the several inferior courts of the Kingdom in such manner as the Legislature might from time to time indicate. By Article 83, the Legislature was authorized to organize Circuit Courts, not less than four.

The Legislature, pursuant to the power reposed in it, divided the "judicial power" between the Supreme, Circuit and police courts.

By the Act of May 26th, 1853, (Section 2), entitled "An Act relating to the Judiciary Department" to be found in Chapter 13 of the Civil Code of 1859, there was conferred upon the Supreme Court "jurisdiction of all cases * * * in equity * * * whether brought before it by original writ, by appeal or otherwise". (Sec. 829, C. C. 1859.) By the same Act (Sec. 883 C. C. 1859) original jurisdiction in certain equity matters was conferred upon the several circuit courts.

In each court therefore accordingly as the "judicial power" was "divided" was reposed jurisdiction in equity over certain matters within equitable cognisance.

By Article 82 of the constitution of 1852, it was provided that the Supreme Court should consist of a Chief Justice and two associate justices. This was enacted into law by the "Act relating to the Judiciary Department" (supra) Sect. 1, found in Section 827, C. C. 1859.

Hence the Supreme Court consisting of a Chief Justice and two associate justices had under the law existing in 1859 jurisdiction in equity "of all cases in * * * equity * * * whether the same be brought before it by original writ, by appeal or otherwise."

By the constitution of 1864 (Art. 66) and of 1887 (Art. 67) the "judicial power" was referred to in substantially the same terms. It was vested in the same courts (Const. 1864, Art. 64. Const. 1887, Art. 64). And its "division" among the several courts was left

to the ultimate prescription of the Legislature. (Const. 1864, Art. 66. Const. 1887, Art. 66.)

Hence it is to the question of "division" of the "judicial power" that we must first direct our attention to determine in what court or courts the power of appointment of trustees was reposed by the Legislature.

Unquestionably under the Constitution of 1852, and the provisions of Section 829, C. C. 1859, the Supreme Court was clothed with equitable jurisdiction in general terms and consequently possessed jurisdiction over all matters of equity except such as were conferred in terms of exclusion upon the "inferior courts."

An examination of the statutes discloses nothing from which could be argued that the Legislature prior to the Judiciary Act of 1892 (Ch. 57, S. L. 1892) took from the Supreme Court its general equity jurisdiction over trusts. The decision of the Supreme Court of the Territory of Hawaii, as a matter of fact, is to the contrary. *Asing* vs. *Aiona*, 6 Haw. 281.

When we speak of "division" of the "judicial power" we are considering courts and not the individual members of the courts. The several constitutions of the Kingdom refer to the "judicial power" as divided among the "Supreme Court and the several inferior courts."

Whatever of division there was by the Legislature of the powers of the court among its members sitting at "Chambers", whether we adopt the reasoning that a justice at Chambers was a separate court or a part

of the court, is another question which we will dispose of later.

And hence we can say that not until the Judiciary Act of 1892 became operative was there reposed in the Circuit Courts any equitable jurisdiction over trusts.

1 A 2. One justice could hold the court.

The constitution, however, of 1852 (Art. 82) and of 1887 (Art. 65), provided that any of the justices of the Supreme Court might hold the court. This provision was omitted from the constitution of 1894 in view of the passage of the Judiciary Act, making the Supreme Court with certain exceptions a court of purely appellate jurisdiction.

1 A 3. System of Chamber sittings results from:

(a) *Power of one justice to hold the court*

(b) *Powers of Chancellor*

(c) *Powers of Vice Chancellor*

(d) *Powers of Justices generally.*

The Legislature under its power "to make all manner of wholesome laws" * * * "not contrary" * * * "or repugnant" to the Constitution (Const. of 1852, Art. 62, and of 1887, Art. 47) took advantage of the provision that one of the justices of the Supreme Court might hold the court to establish a branch of the court denominated "A Judge at Chambers".

The constitution of 1852 further provided that the Chief Justice should be the Chancellor of the Kingdom (Art. 86). This was repeated in the constitution of

1864 (Art. 68) and in the constitution of 1887 (Art. 68). And all the constitutions further conferred upon him such jurisdiction in equity as might be conferred upon him by law.

And pursuant to that power, the Legislature conferred upon the Chief Justice all powers incident to the office of "Chancellor" at Common Law and powers at Chambers to decree the foreclosure of mortgages and generally to hear and determine all matters in equity. (C. C., 1859, Sec. 847.)

The First Associate Justice was constituted a Vice Chancellor with full and concurrent jurisdiction in all matters at Chambers with the Chancellor. (*Id.*)

By Section 4 of the Judiciary Act of 1853, it was provided that the Chief Justice and the two associate justices should respectively have all the powers at Chambers conferred by the then existing laws upon the Chief Justice and Associate Justice.

This provision is not found in so many words in the Civil Code of 1859. By Section 852 of the Code, the several justices were granted powers at Chambers *eo nomine* to admeasure dower and partition real estate. Nothing further appears, but a examination of the statutes does not disclose any amendment or repeal of the provisions of Section 4 of the Judiciary Act conferring upon all the justices the powers reposed in the Chief Justice at Chambers. We are convinced that the power of the associate justice, to "hold the court" in the absence of distinct powers at Chambers was

sufficient to vest in him all the powers in equity possessed by the court.

The system of judges sitting at Chambers was inaugurated without question under the provision allowing one justice to "hold the court" coupled with the ancillary jurisdiction reposed in the Chief Justice as Chancellor and the Associate Justice. We take it that the term "Chancellor" in itself does not confer jurisdiction but is merely the term applied to the presiding judge of the court sitting in equity as understood at Common Law.

It cannot, however, be said that the only time the Third Associate Justice exercised equity powers was when he was holding the court. The Third Associate Justice, under Section 4 of the Act, has all the powers at Chambers of the Chief Justice and First Associate Justice. And if they had called him the Second Vice Chancellor, no greater power could have been conferred upon him thereby.

When one of the justices sat alone at Chambers, he was sitting as the sole member of the court. It was only under the power that one justice might hold the court that the Legislature could assume to confer the equitable powers aforesaid in the court to a branch thereof, to-wit: a Justice at Chambers.

1 A 4. Jurisdiction of the justice at Chambers was concurrent with that of the court.

Nowhere in either the Civil Code of 1859 or the Compiled Laws of 1884 can anything be found which

either expressly or by implication can be taken as a deprivation of the equity powers of the Supreme Court as a court in banco. That the Chief Justice and First Associate Justice as Chancellor and Vice Chancellor respectively and the Third Associate Justice exercised certain powers in equity does not detract from this contention. The jurisdiction at Chambers was simply concurrent with that of the full court.

A similar instance of concurrent jurisdiction is to be found in the grant of admiralty jurisdiction upon the court, (Sec. 829, C. C. 1859), and upon the Chief Justice (847, *Id.*)

In *Fessdon* vs. *Cargo of Ship Charles* (1 Haw. 863) the court holds that it has jurisdiction in admiralty and this power *might* be exercised by the Chief Justice at Chambers. In *Spencer* vs. *Bailey, et al.* (1 Haw. 187) the court holds that the court has jurisdiction in admiralty.

That similar jurisdiction is conferred upon another court does not mean that the court originally exercising jurisdiction is deprived thereof. The jurisdiction is concurrent. *Brewer* vs. *Chase,* 3 Haw. 127,136. *Bailey* vs. *City of New Haven,* 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69-75. *Bowditch* vs. *Banuelos,* 67 Mass. (1 Gray), 220.

This status of the Supreme Court continued through 1883 with the exception that by Act 39 of the Laws of 1876, the powers and duties possessed and exercised by the First Associate Justice of the Supreme Court

were conferred upon the Second Associate Justice. (See Compiled Laws 1884.)

1 A 5. The only difference between the court and judge was the decree of the judge was not conclusive.

Hence in October, 1883, at the time of the execution of the will in question, the law permitted a petition for the appointment of a trustee to be filed before a justice of the Supreme Court in Chambers or the Supreme Court in Banco.

The will provided, however, that vacancy should be filled by a majority of the Justices of the Supreme Court. And hence the method indicated by the will was before a full court or a majority thereof.

The constitution of 1852, Article 87, and the constitution of 1887, Article 69, provided that the decisions of the Supreme Court made by a majority of the justices would be final and conclusive upon all the parties.

And it was to the court in Banco that the testator contemplated that the petitions for the filling of vacancies should be addressed.

Whether the Supreme Court in Banco sat originally or on appeal, its decisions were only conclusive when joined in by a majority and this rule made it necessary that parties litigant who invoked the jurisdiction of the Justices at Chambers have an opportunity of securing a decision which was "conclusive". Hence the statutes upon appeal from the Justice at Chambers to the full court in Banco.

Hence the only difference between the decisions of the court and the decisions of the judge at Chambers was in the latter case the decision was not conclusive. And the methods of appeal granted were simply in furtherance of the Supreme Court's method of securing a hearing by a full court and making the decision conclusive.

The appeal from the judge at Chambers to the full court could not be considered a method of appeal nor could the hearing by the full court be considered in furtherance of its appellate jurisdiction. The appellate jurisdiction of the Supreme Court, prior to the passage of the Judiciary Act of 1892, strictly speaking, was the jurisdiction to hear cases upon appeal from the Circuit and Police Courts. Exceptions to the Court in Banco were only allowed when the court refused on motion to refer the question involved to the full court. (11 Jud. Act. 1853.) Review by appeal was only from the Circuit and District Courts.

Hence the error of the trustees in this case in assuming that the jurisdiction of the Supreme Court in equity matters was only appellate.

It was only upon the passage of the Judiciary Act of 1892 that the Supreme Court became a purely appellate court with the exception of such original jurisdiction as was reposed in it for the purpose of assisting its appellate functions. (*Wahiawa Sugar Co.* vs. *Waialua Agricultural Co.*, 13 Haw. 511.)

1 A 6. Jurisdiction as exercised by the Supreme Court prior to the Judiciary Act of 1892 is not replicated in the system as devised for the Circuit Courts by that Act.

Whereas both by the several constitutions of the Kingdom referred to and the acts of the Legislature passed in conformity thereto, general equity powers were reposed in the Supreme Court and in addition thereto the several justices were given certain powers in equity at Chambers, the Judiciary Act of 1892 clearly demarks the jurisdiction of the Circuit Court and the respective judges of that court at Chambers. By Section 36 of the Act, C. L. 1897, Sec. 1144, it is provided: "The several Circuit Courts shall have jurisdiction * * * as follows:" And by Section 37 of the Act (C. L. 1899, Sec. 1145) it is provided: "The judges of the several Circuit Courts shall have power in Chambers within thier respective jurisdiction * * * as follows:" By the latter section, there is reposed in the Circuit Judges at Chambers power "to hear and determine all matters in equity". But in the former section in respect to the powers of the Circuit Court, not a word appears from which could be implied any equity powers in the court.

And although the same judge that may sit at Term may also sit at Chambers, each constitutes a separate and distinct branch of the other. Collectively the two systems may constitute the Circuit Court, but individually they are separate and distinct. (*Adams* vs.

Parke, 6 Haw. 276-278) (*Silva* vs. *Souza*, 14 Haw. 46). (*Weston National Bank* vs. *Peacock*, 18 Haw. 161). (*Kendall* vs. *Holloway*, 16 Haw. 45). (*Carter* vs. *Judge*, 16 Haw. 242). (*Kala* vs. *Mills*, 15 Haw. 422).

B. Reason and authority indicate the intention of the testator to repose the power in the court and not in its individual members.

1 B 1. Reasons:

(a) *Court authorized by law to appoint trustees.*

(b) *Judicial arm of organized government.*

(c) *Experience in similar matters.*

(d) *Publicity of action.*

(e) *Protection by safeguards surrounding judiciary.*

(f) *Judicial judgment in contradistinction to individual judgment.*

In the first place the provision of the testator is directed to the court for the reason that it is by statute authorized to make appointments. This statutory authority reposed in the court is the lodestone which attracts the donor of the power. The simple process of reasoning indicates to his mind that wherever the power of appointment is reposed by law there will be found the most competent persons to indulge in its exercise.

In the next place the power when reposed in the court is impressed with the sanctity of judicial in contradistinction to individual exercise. It reposes in

a part of the organized system of government which appeals to the layman.

Further, the judges exercising the functions of the court are supposed to represent the greatest experience on the subject. And in the exercise of their functions to draw on that experience and the learning and impartiality with which this high office is characterized. Again the regular and orderly administration of justice contemplates a hearing publicly had and an appointment which would justify the power reposed in the court. Moreover the court is surrounded by the safeguards absent from the individual. The testator naturally in seeking the assistance of the court, seeks all its attributes, the greatest of which is the administration of "justice."

1 B 2. Authorities.

From the authorities that we have been able to examine, it would seem that courts lean toward interpretations of similar grants of powers of appointment to judges of courts exercising jurisdiction over trusts that repose the power in the judge or judges officially and the exercise of that power judicially.

We believe that the following authorities sustain the contention that the testator intended that the court, and not the individual members thereof, for the time being, should exercise the power of appointment which the court then constitutionally held: *In re Estate of Bernice Pauahi Bishop*, 11 Haw. 33. *Carr* vs. *Corning*, 73 N. H. 362, 62 Atl. 168. *Harwood* vs. *Tracy*,

118 Mo. 631, 636-7-8. *Leman* vs. *Sherman,* 117 Ill. 657, 664. *Morrison* vs. *Kelly,* 22 Ill. 609. *Allen's Appeal,* 69 Conn. 702-707. *Wilcox's Appeal,* 54 Conn. 320, 14 Atl. 136. *Massacusetts General Hospital* vs. *Armory,* 39 Mss. (12 Pick.) 445. *Tuckerman* vs. *Currier,* 129 P. (Colo.), 210, 215. Perry on Trusts, Sec. 296.

1 C. The Supreme Court of the Territory of Hawaii has interpreted the act of appointing a substitute trustee as a judicial function.

The Supreme Court in filling the vacancy left by the resignation of William O. Smith indicated by its actions in that regard that the power was reposed in the court and not the individual members thereof. On September 31st, 1886, William O. Smith tendered his resignation from Pomona, Los Angeles County, California. This was entitled, In the Supreme Court of the Hawaiian Islands, and was addressed "To the Honorable Justices of the Supreme Court of the Hawaiian Islands" and was filed in the Supreme Court by Henry Smith, Deputy Clerk, on October 21st, 1886. No formal petition seems to have been filed, and the matter apparently was taken up by the court upon the filing of the resignation. For on the same day, October 21st, 1886, the Clerk's Minutes of Henry Smith, Deputy Clerk, discloses a hearing before Judd, C.J., and McCully, J.

The following order appears on the Clerk's Minutes: "The court refers to the will of the deceased in

accordance with Article 14 of said will and knowing that said nominee is a person of the Protestant religion appointed said Joseph O. Carter as a Trustee to fill the vacancy."

"The court on the same day over the signature of A. F. Judd, L. McCully and Edward Preston entered its formal decree entitled in the court, accepting the resignation of Mr. Smith and appointing J. O. Carter as his successor and requiring that the Trustees file a bond in the sum of $25,000.00 for the faithful performance of their duties as such."

The entire proceedings before the Supreme Court is entitled "In the Matter of the Estate of Bernice Pauahi Bishop, Deceased, Probate Division 2425."

II. *At best, in the absence of an absolute delegation of the power of appointment upon the court as such, a majority of the justices of the Supreme Court have merely the power of nomination and the refusal of the trial judge to appoint the justices' nominee should be sustained.*

II A. Significance of terms employed in clause fourteen of the will.

By the fourteenth clause of the will of the testator, the power reposed in the majority of the justices of the Supreme Court was simply one of choice. The provision is "that vacancies shall be filled by the *choice* of a majority of the justices." In other words, their power was limited to a choice or nomination of a trustee. And that the actual appointment rested with the judge or tribunal then exercising equity jurisdiction,

that is, either of the justices of the Supreme Court at Chambers, or the court in Banco. And the power in equity having been transferred by the Judiciary Act from the Supreme Court to the Circuit Judge at Chambers, a majority of the justices of the Supreme Court may only choose or nominate and it rests finally in the sound discretion of the Circuit Judge at Chambers to appoint. (See *Ogden* vs. *Smith*, 2 Paige, N. Y. 195.)

II B. Action of trustees and Circuit Judges in equity since January, 1893.

And this seems to have been the attitude of the several trustees as vacancies occurred. When confronted at the trial court with intimation that if a majority of the justices had an absolute power of appointment that the Circuit Judge at Chambers was without jurisdiction the trustees were placed in rather an inconsistent position. For surely if there is an absolute delegation of authority to a majority of the justices of the Supreme Court, what was the necessity for any appearance before the Circuit Judge at Chambers for the purpose of so-called confirmation?

It seems to us that the method invoked by the trustees since 1886 indicates that they considered and the several Circuit Judges considered that the authority of the Justices of the Supreme Court was simply that of nomination and that the Circuit Judge at Chambers in Equity actually made the appointment.

This is indicated in the following instances: Resignation of Charles M. Cook and appointment of William F. Allen as substitute trustee on April 8th, 1897; resignation of S. M. Damon and appointment of W. O. Smith as substitute trustee, November 12th, 1897; resignation of Charles R. Bishop and appointment of S. M. Damon as substitute trustee, January 11th, 1898; death of C. W. Hyde and appointment of Alfred Carter, substitute trustee, January 6th, 1911; W. F. Allen resigned and appointment of E. F. Bishop as substitute trustee December 13th, 1904; A. W. Carter resigned and appointment of A. F. Judd as substitute trustee March 7th, 1908; J. O. Carter died and appointment of A. W. Carter as substitute trustee March 22nd, 1909.

II C. Nomination not binding on Circuit Judge.

The nomination of a trustee is not binding upon the appointing power although the nomination is made in accordance with the provisions concerning the filling of vacancies in the office of trustee contained in the instrument creating the trust. (*Appeal of Wilcox*, 8 Atl. Conn. 136-138. *Griswold et al.* vs. *Sacktu et al.* 42 Atl. R. I. 868. *Yates* vs. *Yates*, 99 N. E. Ill. 360-363. Loring "A Trustee's Handbook" pg. 19. *Bowditch* vs. *Banuelos*, 1 Gray 220, 231. *Montefcore* vs. *Guedalla*, L. R. 1903, 2 Ch. 723.

II D. Court found as a fact the nominee not a fit and proper person.

The refusal of the Circuit Judge at Chambers to appoint the nominee of the majority of the justices of the Supreme Court should be sustained upon the findings of the Judge that the nominee is not a fit and proper person. The trial judge held that there was no evidence to show that Mr. Williamson was a fit and proper person to be appointed.

The Kamehameha School Trust is a quasi public trust. It involves the education of the Hawaiian youth of both sexes. And the trial judge found that it had not been made to appear that he was qualified by length of residence in Hawaii, or by familiarity and sympathy with the history, manners, customs, language and ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he would be authorized and expected to exercise a wide, benevolent and sympathetic discretion in the education of Hawaiian youth of either sex, concerning the general scheme, system and regulations to be adopted and observed during their attendance at the schools in question.

We believe that this finding should not be disturbed. That a contrary finding was not made in respect to Mr. King, the appointee, is immaterial.

We have taken the liberty of referring to the opinion of the trial judge, considering that questions involved have been therein set forth more clearly and forcibly than we are able to do. And if we seem in the main to cite the same decisions, it is not for want of

research, but for the limitations of the authorities upon the particular points involved.

We have not attempted in this brief to go into or cite authority upon the general powers of equity or the general rules concerning the granting of the power of appointment by trustors in testamentary trusts.

We respectfully submit that the decree of the First Circuit Judge of the First Judicial Circuit sitting at Chambers in Equity should have been sustained and that therefore the Supreme Court of the Territory of Hawaii erred in rendering its opinion of February 1, 1917, holding William Williamson to have been properly appointed.

Attorney for Charles E. King.

Service of the within Brief of the Apellant and receipt of a copy thereof is acknowledged this 26th day of September, A. D. 1917.

Holmes & Olson

Attorneys for Appellees.